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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DEJAMES HENDERSON, Defendant and Appellant.	2d Crim. No. B233303 (Super. Ct. No. TA113425) (Los Angeles County)

Dejames Henderson appeals the judgment following his conviction for first degree murder (Pen. Code, §§ 187, subd. (a)/189.)[1] The jury found that in committing the offense he personally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (b)-(d).) Henderson was sentenced to 25 years to life for the murder, plus 25 years to life for the firearm enhancement. He contends there was insufficient evidence that the murder was premeditated or deliberated, use of CALCRIM No. 362 and CALCRIM No. 852 violated his due process rights, and the trial court erroneously admitted evidence of prior acts of domestic violence. He also claims error in the computation of presentence credit. We will order a correction in the abstract of judgment regarding presentence credit. Otherwise, we affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

Henderson and Shavonna Jones were married. They lived together in an apartment with Jones's two sons.

On the evening of May 21, 2010, Jones and several of her friends were socializing at her apartment. Henderson was not at home. Henderson telephoned Jones while he was driving home. The telephone call disturbed Jones who described Henderson to her friends as "mad" and "stupid." Shortly thereafter, Henderson arrived home with friend Roscoe Williams and two other men. Henderson entered his apartment and stared at the women without saying a word. He changed his shirt and left the apartment saying he would be right back. Later in the evening, Henderson drove back to his apartment with Williams and the other two men. Henderson went into the apartment and the three men waited outside. Henderson looked angry and was pacing back and forth. He called Williams inside and they discussed a house remodeling project. Henderson then asked everyone to leave.

The three men who were with Henderson stayed in the apartment complex area waiting for Henderson to drive them home. Williams heard Henderson and Jones arguing inside their apartment. A few minutes later, Williams heard a "pop" coming from the apartment. One neighbor heard a "boom" from the apartment, and another heard a gunshot and the sound of someone hitting the floor.

Henderson came out of the apartment and got into his car with Williams and the other two men. He drove fast and ran a red light. When asked about his driving, Henderson told Williams, "I think I shot my wife." Williams saw a black revolver between the front seats. Henderson dropped off Williams and the other men and drove away alone.

Jones's body was discovered by her son the following morning. Jones had been shot through her left eye and had been dead for several hours. The police found no indication of a struggle. The spent bullet from the shooting was found in the wall at an angle that indicated that Jones was standing when she was shot. The condition of the bullet wound indicated that the shot had been fired from more than two feet away.

Henderson was seen in the Los Angeles area a few days after the shooting. A witness testified that he stated that he had "shot the bitch in her head," and showed no remorse. He also told his aunt that he had accidentally shot Jones.

Henderson then went to Minnesota and moved in with a woman for a short period of time. Henderson was arrested in Minnesota on August 10, 2010. Henderson told the police he was not present when Jones was shot.

DISCUSSION

Substantial Evidence of Premeditation

Henderson contends there is insufficient evidence to support the finding that the murder was premeditated and deliberate. We disagree.

In considering a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (E.g., *People v. Avila* (2009) 46 Cal.4th 680, 701.) We presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment whether the evidence is direct or circumstantial. (*Ibid.*) We do not reweigh evidence and will reverse only where there is insufficient evidence to support the conviction under any hypothesis. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]'" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

A first degree murder conviction requires the prosecution to prove beyond a reasonable doubt that the defendant acted with an intent to kill, and with premeditation

and deliberation. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223.) An intentional killing is premeditated and deliberate if it resulted from preexisting thought and reflection rather than unconsidered or rash impulse. (*People v. Hughes* (2002) 27 Cal.4th 287, 370-371.) The requisite reflection does not require a specific or extended period of time. Thoughts may follow each other with great rapidity and a calculated decision may be arrived at quickly even during an altercation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767; see also *People v. Stitely* (2005) 35 Cal.4th 514, 543.)

Appellate courts typically rely on three kinds of evidence in resolving the issue of premeditation and deliberation: motive, planning activity, and manner of killing. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658, citing *People v. Anderson* (1968) 70 Cal.2d 15.) These factors need not be present in any particular combination or degree. (*People v. Burney* (2009) 47 Cal.4th 203, 235.)

Here, the record discloses evidence in all three categories. As to motive, there was evidence that the relationship between Henderson and Jones was volatile and included a series of escalating confrontations. A few weeks before the shooting, Henderson fired shots in Jones's living room after an argument. As to planning, Henderson telephoned Jones shortly before the shooting to determine who was in the residence with her. Also, the content of that telephone call upset Jones. When Henderson arrived at the residence, he was sullen and silent and paced back and forth. This evidence supports the inference that he was attempting to intimidate the guests into leaving so that there would be no witnesses to his subsequent conduct. He also had a loaded gun in his possession. Based on this evidence, the jury reasonably could infer that Henderson "thought before he acted." (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224.)

The manner of the killing also supported the conclusion that the murder was premeditated and deliberate in that it "shows a calculated design to ensure death rather than an unconsidered explosion of violence." (*People v. Horning* (2004) 34 Cal.4th 871, 902-903.) Henderson had the time to draw or obtain the gun, aim, and fire a single shot to the head of his victim. This evidence, as well as the trajectory of the bullet,

and the absence of signs of a struggle, indicate the shooting was calculated to cause death. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [shot to vital part of body at close range]; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 768 [shot fired at face consistent with preconceived design to kill].)

We conclude that there was sufficient evidence for a reasonable jury to conclude that the murder was premeditated and deliberate.

Use of CALCRIM No. 362 Did Not Violate Due Process

The trial court instructed the jury that jurors could consider Henderson's false or misleading statements regarding the charged crime as showing he "was aware of his guilt of the crime." (CALCRIM No. 362.)[2] Henderson contends the instruction violated his due process rights because it permitted an irrational inference that he was guilty of murder based on false statements to the police. We disagree.

Our Supreme Court has repeatedly upheld the constitutionality of CALJIC No. 2.03, the predecessor of CALCRIM No. 362, against a variety of challenges including that it permits the jury to draw an irrational inference regarding a defendant's state of mind. (*People v. Crandell* (1988) 46 Cal.3d 833, 871; *People v. Kelly* (1992) 1 Cal.4th 495, 531–532; see also, e.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1024–1025; *People v. Holloway* (2004) 33 Cal.4th 96, 142.) Relying on these cases, one Court of Appeal panel has expressly upheld the constitutionality of CALCRIM No. 362. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.) We conclude that these cases are controlling.

"A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) "The

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[2] The trial court instructed the jury with CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 142.)

Henderson claims that the slightly different language of CALCRIM No. 362 creates a constitutionally impermissible inference that did not exist in CALJIC No. 2.03.[3] CALJIC No. 2.03 provided that the jury may consider false statements regarding the charged crime "as a circumstance tending to prove *consciousness of guilt*" whereas CALCRIM No. 362 provides that the jury may consider such false statements as showing the defendant "was *aware of his guilt of the crime*." (Italics added.) Henderson argues that the replacement of the phrase "consciousness of guilt" with the phrase "aware of his guilt of the crime" permits the jury to make the irrational inference that he was guilty of the charged crime based solely on his false statements. Henderson treats first degree murder as the charged crime rather than simply murder as stated in section 187, and argues that it is irrational to allow the jury to infer first degree murder as opposed to a lesser form of homicide from his false statements regarding his whereabouts during the shooting.

There is no meaningful difference in the two phrases other than the use of more readily understandable language in CALCRIM No. 362. As with CALJIC No. 2.03, CALCRIM No. 362 allows the jury to consider evidence of awareness of guilt to strengthen inferences of guilt arising from other evidence. Reasonable jurors would understand that "aware of his guilt of the crime" means awareness of *a* crime, not necessarily the specifically charged crime. Here, the charged crime was murder but the jury was instructed on both degrees of murder, voluntary manslaughter, and accidental homicide. There is no basis to conclude that CALCRIM No. 362 induced the jury to convict Henderson of first degree murder rather than a lesser homicide.

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[3] CALJIC No. 2.03 provided: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

As stated in *People v. McGowan, supra*, 160 Cal.App.4th at page 1104, the difference between CALCRIM No. 362 and CALJIC No. 2.03 are minor. CALCRIM No. 362 continues to instruct the jury that false statement evidence is not sufficient to prove guilt standing alone. It is permissive, not mandatory, and allows the jury to determine what weight should be given to that evidence.

Henderson relies on *People v. Crandell, supra*, 46 Cal.3d 833, overruled on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365. In *Crandell*, the defendant challenged CALJIC No. 2.03's phrase "consciousness of guilt." He argued the jury might "view 'consciousness of guilt' as equivalent to a confession, establishing all elements of the charged murder offenses, including premeditation and deliberation, though [the] defendant might be conscious only of having committed some form of unlawful homicide." (*Id.* at p. 871.)

The Supreme Court rejected this argument and upheld the constitutionality of CALJIC No. 2.03. The court stated that the defendant's "fear that the jury might have confused the psychological and legal meanings of 'guilt' is unwarranted. A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense." (*People v. Crandell, supra*, 46 Cal.3d at p. 871.) There is nothing in *Crandell* to suggest that "awareness" of guilt of the crime as opposed to "consciousness" of guilt would change the court's analysis.

Use of CALCRIM No. 852 Did Not Violate Due Process

The trial court instructed the jury that, if the jurors found Henderson had a propensity to commit domestic violence based upon prior acts of domestic violence, they could conclude he was likely to commit, and did commit, murder. (CALCRIM No.

852.)[4] Henderson contends the instruction violated his constitutional due process rights because it permitted the jury to make an irrational inference that prior acts of domestic violence made him more likely to have committed murder as opposed to a lesser form of homicide. We disagree.

Under Evidence Code section 1101, evidence of prior uncharged criminal acts is inadmissible to show a disposition to commit such acts. The Legislature, however, has created exceptions to this rule in cases involving sexual offenses and domestic violence. (Evid. Code, §§ 1108, 1109.) Our Supreme Court has upheld the constitutionality of Evidence Code section 1108 (*People v. Falsetta* (1999) 21 Cal.4th 903, 915) as well as a jury instruction explaining the application of Evidence Code section 1108. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012; CALJIC No. 2.50.01.) The analysis in these cases has been relied on by courts of appeal to uphold the constitutionality of Evidence Code section 1109 as well as CALCRIM No. 852 and its predecessors which explain the application of Evidence Code section 1109. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251-253; *People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740; *People v. Pescador* (2004) 119 Cal.App.4th 252, 261; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1097.)

CALCRIM No. 852 explains that *if* the jury finds the defendant committed the uncharged acts, it *may* but is not required to conclude the defendant was disposed to

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4 In pertinent part, the jury was instructed with CALCRIM No. 852, as follows: "The People presented evidence that the defendant committed domestic violence that was not charged in this case. . . . [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit murder. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The People must still prove the charge and allegation beyond a reasonable doubt."

or inclined to commit domestic violence, and may also conclude that the defendant was likely to commit and did commit the crimes charged in the case. The instruction indicates that a disposition to commit domestic violence is only one factor to consider, along with all the other evidence and specifies that such a finding is insufficient to prove the defendant's guilt on the charged offenses. (CALCRIM No. 852; *People v. Reyes, supra,* 160 Cal.App.4th at pp. 251–252.) The People must still prove each element of every charge beyond a reasonable doubt. (*Ibid.*)

We therefore reject Henderson's challenge to the jury instruction as having already been settled unfavorably to him. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529.)

Henderson, as he did in his argument regarding CALCRIM No. 362, attempts to draw a distinction between murder or first degree murder cases and cases concerning lesser forms of homicide. But, he cites no legal authority supporting his distinction and ignores the large body of published cases which uphold the jury instruction. Courts have found no due process violation in admission of evidence of prior domestic violence to show propensity to commit murder. (See *People v. Johnson* (2000) 77 Cal.App.4th 410, 416–417; *People v. Pescador, supra,*119 Cal.App.4th 252; *People v. Escobar, supra*, 82 Cal.App.4th 1085.) Here, the charged crime was murder but the jury was instructed on both degrees of murder and lesser forms of homicide. There is no basis to conclude that the instruction required the jury to convict Henderson of first degree murder as opposed to another form of homicide.

No Error in Admission of Uncharged Acts of Domestic Violence

Henderson contends that the trial court abused its discretion in admitting excessive evidence of prior acts of domestic violence. (Evid. Code, § 1109.)[5] He argues that the probative value of the evidence is substantially outweighed by its possible prejudicial impact. (Evid. Code, § 352.) We disagree.

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5 Henderson asserts that Evidence Code section 1109 is unconstitutional but, conceding that our Supreme Court has upheld its constitutionality, makes the claim to preserve it for federal review.

Where domestic violence is charged, evidence of a defendant's commission of other acts of domestic violence is admissible to prove a propensity to commit such acts. (§ 1109, subd. (a).) The trial court, however, has discretion to exclude such evidence where it is more prejudicial than probative. (Evid. Code, § 352.) "Prejudice" within the meaning of Evidence Code section 352 pertains to evidence tending to evoke an emotional bias against a party, with little relevance to the issues. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.)

In determining the admissibility of such evidence, trial courts should weigh a variety of factors, including the similarity of the uncharged acts to the charged offense, the nature of the prior acts and whether they were more inflammatory than the charged offense, remoteness in time of the prior acts, and whether the defendant was convicted of the prior acts. (*People v. Falsetta, supra,* 21 Cal.4th at p. 917; see also *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) A trial court's ruling will be upheld unless the court acted in an arbitrary or capricious manner that resulted in a manifest miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Here, the trial court admitted evidence of several prior acts of domestic violence by Henderson as follows: In July 2003, Henderson telephoned Stacy Harris, mother of two of his children. Upset that Harris would not let him see the children, Henderson threatened her over the telephone by stating that he was "strapped" with a gun and would do something to everyone in Harris's house. Harris obtained a restraining order based on this threat. Harris also testified that Henderson had punched her in the face following an argument in 2000.

In November 2007, Henderson was in relationships with both Jasmine Renfro and Keisha Latson. He wanted to end his relationship with Renfro. They argued and Henderson punched Renfro. Henderson told Renfro he had something to make her leave. He went to a bedroom and returned with a handgun. He pointed the gun at Renfro, and stated: "Bitch, you still here? Leave." Henderson was arrested for that incident. Latson was present during the incident and, at Latson's emotional request, Renfro declined to testify against Henderson.

In May 2009, Shavonna Jones, the victim in the instant case, asked her mother to change the locks on the doors to keep Henderson out. Henderson arrived while the mother was changing the locks, knocked the mother down, ran into Jones's bedroom, threw a television to the floor, and stomped on it. He then slapped Jones and knocked her down. Another person at the apartment thought she saw a gun in Henderson's waistband and called the police.

In December 2009, Jones wanted Henderson to leave her home one morning. They argued when Henderson refused to leave. Henderson hit Jones on the face causing two gashes near her eye that required 14 stitches.

Approximately two weeks before Jones was killed, a friend heard gunshots from Jones's apartment. Immediately thereafter, a neighbor watched Henderson leave the apartment with what appeared to be a gun. Jones told a friend that Henderson had fired some shots in the living room following an argument.

This evidence shows a continuous recurrence of domestic violence over a period of less than 10 years, none of the prior acts were more inflammatory than the charged offense, and the number of prior incidents was not excessive. The evidence, on the other hand, was highly relevant and probative because the incidents involved similar acts of physical violence by Henderson against Jones and other domestic partners showing a pattern of domestic violence. This is precisely what the Legislature was concerned with in enacting section 1109. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) There was no abuse of discretion in admitting the evidence.

Henderson argues that the prior incidents were inflammatory, but none were more inflammatory than the charged offense. In both the uncharged acts and the charged offense, Henderson assaulted and manhandled the victims and asserted dominance and control. Although evidence of incidents involving a greater level of violence might be prejudicial, evidence of comparable or lesser violence would not. (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 370-371; *People v. Soto* (1998) 64 Cal.App.4th 966, 986.)

Henderson argues the trial court admitted evidence of an excessive number of prior incidents of domestic violence, and may have caused the jury to convict him based on the prior acts rather than the charged offenses. We see no indication of such a danger in the record. The jury was instructed that it must not be influenced by sympathy or bias and that the prior act evidence was admitted for a limited purpose. We presume the jury understood and followed the instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

Henderson also argues that the prior incidents did not involve malice and were not relevant to prove the malice element of murder. We disagree with the assertion that the prior incidents were not malicious in the conventional sense of the word "malice," and disagree with the implied assertion that evidence is admissible only if it is relevant to a specific legal element of the charged offense.

Error in Presentence Custody Credit

Henderson contends that the trial court erred in awarding him 277 days of presentence credit and that he is entitled to 12 additional days. Respondent concedes the issue, and we accept the concession.

Section 2900.5 provides: "In all felony . . . convictions, either by plea or by verdict, when the defendant has been in custody . . . all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment . . . ." "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]" (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) Here, Henderson was arrested on August 10, 2010, and sentenced on May 25, 2011, 289 days after his arrest.

DISPOSITION

The judgment is modified to award appellant 289 days of actual presentence custody. We direct the sentencing court to amend the abstract of judgment to reflect that number of days, and send a certified copy of the amended abstract to the

Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Paul A. Bacigalupo, Judge

Superior Court County of Los Angeles

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

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